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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-401

DWIGHT L. CHAPIN, *Petitioner*,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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November 21, 1975

PEARL OF DUPONT & ADAMS PRINTING, INC., WASHINGTON, D. C.

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The Government's Memorandum in Opposition succeeds only in obscuring the basic question presented in the Petition. That question is whether the *Bronston* principle—**"precise questioning is imperative as a predicate for the offense of perjury"** (409 U.S. at 362)—should be applied not only in the context of an unresponsive answer but also in the context of an ambiguous and imprecise question.

This case presents an opportunity to make certain that this new prejury statute, 18 U.S.C. § 1623, does

not become too tempting a vehicle for easy perjury indictments in situations where the prosecutors can find no other crime but nonetheless deem some sort of prosecution desirable. The final Report of the Watergate Special Prosecution Force, issued after the instant Petition was filed, reveals the intensity and scope of that problem.

And in light of the Government's Memorandum, one other question in the Petition stands unrefuted in terms of certiorari importance. That question was reserved 80 years ago in *Connors* v. *United States,* 158 U.S. 408, 415 (1895), and is now ripe for resolution. That question is whether, in the context of this political-type case, there was "some special reason" or some "extraordinary circumstances" requiring a *voir dire* as to the jurors' political affiliations.

I.

To begin with, the Government errs in denying (Memorandum, p. 7) the assertion in the Petition (p. 19) that this is the "first opportunity for this Court to chart the contours" of § 1623. None of the other petitions before this Court in prosecutions arising *in part* from § 1623 raised any *Bronston*-type questions as to the scope of this new statute; for the most part, those petitions raised entirely unrelated constitutional and procedural problems. See *Ruggiero* v. *United States,* No. 72-1300, 412 U.S. 939; *Kahn* v. *United States,* Nos. 72-1191, 72-1193, 411 U.S. 982; *Kerner* v. *United States,* Nos. 73-1650, 73-1651, 417 U.S. 976.

As to the instant case of first impression, an extension of the *Bronston* principle to the interrogator's question involves a three-step speculation on the part of

the jury in a perjury-type case. Logically, the jury must first assess what the interrogator had in mind when he asked the imprecise question. And then the jury must assess what the witness thought the interrogator meant, as well as what the question meant to the witness. In actuality, then, the jury must make a "triple guess" as to (1) the interrogator's intent, (2) the witness' interpretation of that intent, and (3) the witness' own interpretation of the question. Only then can the jury begin to determine if the witness' response was knowingly false.

Such "triple guessing" becomes impossible where the Government has not produced the interrogator at the trial to make clear what he meant in asking the question. That is why the *Van Liew* decision of the Fifth Circuit, 321 F.2d 674, 682-683, is so much in point and therefore so much in conflict with the result below. The Fifth Circuit there held that where the question is subject to more than one interpretation, the Government is obligated (1) to produce the interrogator to prove the meaning he attached to his own question, and (2) to prove that the witness knew "the sense in which the interrogator used the words," and nonetheless gave an answer which he knew to be false to the question "as thus put in the sense thus intended."

The Government here has not grasped the nature or significance of this vital problem; nor has it understood the reason why the *Van Liew* decision is so clearly in conflict. The Government seems content to rely on the thought (Memorandum, p. 6) that under the instructions to the jury the petitioner "was afforded the opportunity of acquittal if his answer was literally true under any reasonable interpretation of the ques-

tion, even if petitioner did not hold that interpretation at the time he testified."

The difficulty with that position, however, is that the jury's determination as to "any reasonable interpretation of the question" is only partly responsive to the necessities of this type of perjury prosecution. The kingpin in the Government's proof, where the ambiguity lies in the question rather than the answer, is to be found in the testimony of the interrogator himself—as the *Van Liew* case holds. That proof was simply not forthcoming in this case. We still do not know whether the prosecutor meant to ask (1) whether Chapin knew of any personal distribution by Segretti, or whether Chapin knew Segretti had caused others to distribute campaign literature, or (2) whether Chapin was interested in or gave directions with respect to a particular candidate to the exclusion of all others, or did so with respect to particular candidates included in the master plan. *Van Liew* requires that the Government supply the prosecutor's intent in those respects. And, however perfect the jury instructions may have otherwise been, *Bronston* teaches that a perjury prosecution or conviction cannot be premised on such unresolved ambiguities in the questions.

The Government's refusal to confront the obvious implications of the *Bronston* decision may well reflect its general antipathy toward the restraints which *Bronston* and other decisions have put on perjury prosecutions. The Watergate Special Prosecution Force's final Report reveals the Special Prosecutor's impatience with such restraints.

At page 36 of that Report, in complaining about "the exacting demands of a perjury prosecution," the

Special Prosecutor agonized over the imposition on the prosecutors of having "to search for a sequence of specific questions and answers that met the crime's narrow definition in order to bring a legally sustainable charge." Many such questions and answers, though "constituting the basis of possible perjury charges," had to be ignored since—to the dismay of the prosecutors—the questions and answers often "contained qualifying phrases and ambiguities which made it difficult to show that this definition had been met." And the *Bronston* decision was cited as an example of "recent judicial interpretations of the perjury statutes [that] have held that an evasive or misleading statement, even if made with the obvious intent to deceive the questioner, does not constitute perjury if it is literally true."

Grand jury proceedings have thus become the target of the prosecutors' "ingenious scrutiny" to find some question and answer into which the § 1623 crime of perjury might be poured. Unable to find other crimes with which to charge the witness, and hemmed in by the *Bronston*-type restraints on perjury charges, the prosecutors have been forced to read after-the-fact meaning into the ambiguous questions and falsity into the witness' response to what he thought the interrogator meant by the questions. And in bringing a § 1623 perjury prosecution based on such slender reeds, the prosecutors need only hope that the judge and jury will sweep away the imperfections and deficiencies in proof by saying, "Sorry, but under the instructions the witness must have known the proper or reasonable meaning of the ambiguous question; hence the witness must have knowingly lied."

Indeed, it is significant that the Government's Memorandum not once acknowledges that some ambiguity may lie in the prosecutor's questions. Nowhere in that Memorandum is there any indication that the burden was on the Government to prove what the presecutor here meant. Such a cavalier approach to this new perjury statute can only have a chilling effect on the ability or desire to speak freely—or indeed to testify at all—when one is called before a grand jury, without the benefit of counsel.

II.

In one other aspect, the Government's Memorandum has completely distorted the Petition. Contrary to the statement on page 1 of the Memorandum, the petitioner does not claim that the trial judge "erred in not asking questions to elicit details of the *political beliefs* of prospective jurors." Question 4 in the Petition (p. 3) raises the issue as to whether the judge erred in not inquiring "as to the *political affiliations and preferences* of the prospective jurors."

There is a world of difference between those two formulations. Suffice it to say here that the Government's reprint (Memorandum, pp. 10-11) of the lower court's opinion on the "political affiliations and preferences" question is totally unresponsive to the Petition's treatment of that opinion in terms of its certiorari importance. As stated in the Petition (p. 31), this Court in *Connors,* 158 U.S. at 415, indicated that there might be "some special reason" or "extraordinary circumstances" that would require a *voir dire* as to the jurors' political affiliations or party predelictions. And so, as the Petition stated (p. 31):

> "The refusal of Judge Gesell, on constitutional grounds, to question the prospective jurors as to

> their affiliations with the Republican or Democratic parties directly poses the *Connors* question. In the context of this case, are there what the *Connors* decision called 'exceptional circumstances' requiring the asking of such political questions? Do the factors here involved, such as the Watergate-related aspect of this case, the partisan political nature of the Segretti material, and the other political overtones of this prosecution, constitute 'exceptional circumsances' within the intent of the *Connors* ruling? Are there First Amendment or other constitutional reasons for barring such questions?"

The Government has simply not addressed its Memorandum to those certiorari-related questions.

CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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